PLANNING AND ENVIRONMENT LAW

Seminar conducted by University of New South Wales
Faculty of Law on 5 March 2014

Opening Remarks by Justice Peter Biscoe

1. In my opening remarks, I wish to touch upon two recent unrelated developments:

    (1) The new judicial review rules of court.

    (2) Last Friday's decision of the Court of Appeal concerning an important aspect of resumption compensation law, namely the construction and operation of s 61 of the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**): *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1991* [2014] NSWCA 33.

The New Judicial Review Rules

2. Actually, the new judicial review rules are not so new, having commenced in March 2013. They are in Part 59 of the *Uniform Civil Procedure Rules* 2005. They apply to judicial review proceedings in the Supreme Court and to judicial review proceedings in the Land and Environment Court in Classes 4 and 8 (mining) of the Court's jurisdiction.

3. It is important to understand the requirements of this new regime:

    (1) The body or person responsible for a decision must be joined as a respondent but not as the first respondent unless there is no other respondent: r 59.3(4). This changes a long-standing practice in the Land and Environment Court to join the body or person responsible for a decision to be reviewed – a council or

a Minister – as the first respondent and the developer as the second respondent.

(2) Judicial review proceedings can only be commenced by summons, not by statement of claim: r 59.3. The summons must state "with specificity" the grounds on which relief is sought: r 59.4.

(3) Only five days are allowed for service of the summons after it is filed (unless the Court otherwise directs): r 59.5. This indicates the pace at which judicial review matters should proceed.

(4) The respondent must within two days after service (or such other times the Court may direct) file and serve a response stating whether the respondent opposes the relief sought and, if so, on which grounds: r 59.6.

(5) Evidence must be by way of affidavit (unless the Court otherwise directs): r 59.7(1).

(6) Cross-examination is permitted only by leave of the Court which, if practicable, should be sought prior to the hearing: r 59.

(7) Subject to any direction of the Court, the parties are required to confer and prepare a paginated and indexed white Court book to be filed and served within two working days before the hearing containing prescribed documents including summaries of the parties' arguments not exceeding 10 pages: r 59.8.

(8) There are important processes in r 59.2 for obtaining reasons for decisions from public authorities. Where a public authority

is a defendant (as is usually the case in the Land and Environment Court):

(a) The applicant may (not must) within 21 days of commencing the proceedings (or such other time as the Court directs) serve on the public authority a notice requiring it to provide to the applicant a copy of the decision and a *statement of reasons for the decision*.

(b) The statement of reasons must set out findings on material questions of fact, refer to the evidence and other material on which the findings were based, and explain why the decision was made.

(c) If the public authority does not comply with the notice within 14 days, or if the applicant has not served a notice within 21 days of commencing the proceedings, the applicant may apply to the court for an order that public authority provide the applicant with those documents.

(9) There is an important new time limit for commencing judicial review proceedings: r 59.10. They must be commenced within three months of the date of the decision unless the court extends that time. Matters the court should take into account when considering whether to extend time are listed. However, the rule does not apply to proceedings in which there is a statutory time limit for commencing the proceedings (eg s 101 of the *Environmental Planning and Assessment Act* 1979 where a three month time limit runs from the date on which public notice of the decision is given). Nor does it apply to proceedings in which the setting aside of the decision is not required.

(10) Finally, the new rules set their face against security for costs in judicial review proceedings: r 59.11. An applicant is not to be required to provide security for costs except in exceptional circumstances. Where an applicant invokes an open standing provision or commences representative proceedings, the Court is not to treat the applicant as bringing proceedings for the benefit of a third party for the purpose of considering whether exceptional circumstances exist.

4. The new judicial review rules concerning extension of time for commencing proceedings and reasons for decision were considered by me in *Regional Express Holdings Ltd v Dubbo City Council (No 2)* [2013] NSWLEC 113. The Land and Environment Court's new Class 4 Practice Note which recently came into force in January 2014 accommodates the new judicial review rules.

Section 61 Just Terms Act and El Boustani

5. When land is resumed, a person with an interest in the land is entitled to be paid compensation including for losses attributable to disturbance: ss 37, 55(d), 59 *Just Terms Act*. Disturbance losses include costs associated with relocation.

6. However, disturbance losses that would otherwise be payable under s 59 are not payable if they fall within s 61:

> **61 Special provision relating to market value assessed on potential of land**
>
> If the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:
>
> (a) any financial advantage that would necessarily have been forgone in realising that potential, and
> (b) any financial loss that would necessarily have been incurred in realising that potential.

7. I considered s 61 in *McDonald v Roads and Traffic Authority* [2009] NSWLEC 105, (2009) 169 LGERA 352 at [121] – [136]; as the Court of Appeal then did in *Sydney Water Corporation v Caruso* [2009] NSWCA 391, (2009) 190 LGERA 298; and *Roads and Traffic Authority v McDonald* [2010] NSWCA 236, (2010) 79 NSWLR 155.

8. The idea behind s 61(b) is that if the owner would have to relocate anyway in order to sell land at its higher value based on its potentiality, then it is inconsistent (and therefore unjust) that the owner should also recover relocation costs as disturbance loss. Although s 61 has to be construed according to its own terms, this idea can be traced back to the majority judgment in the English Court of Appeal in *Horn v Sunderland Corporation* [1941] 2 KB 26. Actually, the majority view in *Horn* is not precisely expressed in s 61 in at least one significant respect (although perhaps it is implicit). As observed in *Commonwealth v Milledge* (1953) 90 CLR 157 at 165, the majority in *Horn* held that disturbance compensation in such a case should only be awarded to the extent (if any) that the value of the land for its existing purposes together with the compensation for disturbance *exceeds* the compensation payable on the basis of its use for a potential purpose.

9. If you accept the inconsistency reasoning (the minority judge in *Horn* did not), s 61(b) may be thought to operate justly to preclude recovery of compensation for relocation costs where the land is ready for development at the resumption date (as at which market value is assessed).

10. But is it just to deny the owner relocation costs where the resumed land is not fully ripe for development, but nevertheless has enhanced market value at the resumption date due to its development potentiality in, say, 10 or 20 years in the future? For example, say it was worth $50,000 for its existing purpose as mere agricultural land, $200,000 if fully ripe for development as a residential subdivision, but in fact was worth $75,000 for its potential to be developed for residential subdivision in 10 years. The legal question is: does s 61(b) deny the owner compensation for relocation

costs in such a scenario? The answer of the Court of Appeal in *El Boustani* is “no” if the potential development lies 10 years in the future, but “yes” if the land is “ripe” for the potential development at the resumption date. The description “ripe” was not defined, but would include where it was ready for development immediately or (presumably) within a relatively short period. Preston CJ of LEC (Beazley P and Gleeson JA agreeing) explained at [110] – [115]:

> 110 Fourthly, **the financial loss must be a loss that would "necessarily have been incurred" in realising that potential.** The adverb "necessarily" means: "1. by or of necessity; 2. as a necessary result". The word "necessity", in turn, means: "1. something necessary or indispensable": Macquarie Dictionary (4th ed, 2005). Hence, the financial loss must be incurred inevitably or as a necessary result in realising the potential to use the land for a purpose other than that for which it is currently used: see also Roads and Traffic Authority of New South Wales v McDonald at [94].
>
> 111 If the financial loss is incurred for reasons other than realising the potential to use the land for that other purpose, it will not satisfy the requirement of being necessarily incurred to realise that potential. For example, legal costs or valuation fees incurred by the persons entitled to compensation in connection with a compulsory acquisition of the land (within s 59(a) and (b) of the Act) will not satisfy the requirement of being necessarily incurred in realising that potential: Sydney Water Corporation v Caruso at [185].
>
> 112 Whether and when a financial loss will be incurred inevitably or as a necessary result in realising that potential will depend in part on the temporal proximity or conversely remoteness of the potential.
>
> 113 **As the potential to use the land for a purpose other than the purpose for which it is currently used becomes more remote, it will become more difficult to satisfy the requirement of necessity or inevitability.** For example, if the potential is that the land is unlikely to be developed for a purpose other than the purpose for which it is currently used for another 10 years, then the land is likely to continue to be used for its current use for those next 10 years. A sale of the land now would not realise the potential to be used for the purpose other than the purpose for which the land is currently used - such realisation will not occur for 10 years. The land will continue to be used for the purpose for which it is currently used after the sale, although still having the potential to be used for that other purpose, some 10 years in the future.

> 114 On the other hand, if the land is ripe for redevelopment for the other purpose, the sale of the land now will realise the potential to be developed for that other purpose.
>
> 115 **A financial loss, such as relocation costs, incurred in connection with the sale of the land could be said to be necessarily incurred in realising the potential in the case of the land that is ripe for development for the other purpose but not in the case of the land where the potential for development for that other purpose is some 10 years away**.
>
> (emphasis added)

11. Where land is not "ripe" for development and the potential development on which market value is assessed is less than 10 years – for example five years - after the date of assessment, there is a vexed question as to how s 61 should be construed to operate. In *El Boustani* the Court of Appeal did not explore that question beyond indicating that it was difficult: at [13]. There may be no bright line answer, but it is worth probing further. Does s 61 mean that up to an estimated future date for realisation of the potential the owner gets nothing for relocation costs, but then a day later fully recovers relocation costs? There is something unsatisfactory about such an all or nothing rule dependent upon time. When market value has been assessed on the basis of potentiality of development which is neither "ripe" nor 10 years away – say 5 years – is there scope for a construction of s 61 which allows apportionment of relocation costs – half in the five year example?